88-1034

Supreme Court, U.S.
FILED
DEC 12 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1988

QUENTIN M. DERRYBERRY II,

Defendant-Petitioner,

v.

UNITED STATES OF AMERICA,

Plaintiff-Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Of Counsel:
Kenneth W. Sullivan
221 N. LaSalle Street
Suite 2100
Chicago, IL 60601
(312) 346-7600

George Pappas*
Walsh, Neville,
Pappas & Mahoney
221 N. LaSalle
Street
Suite 2100
Chicago, IL 60601
(312) 236-1900

*Counsel of
Record

QUESTIONS PRESENTED FOR REVIEW

Whether the Circuit Court erred in not reversing petitioner's conviction for perjury on the grounds that petitioner's purportedly perjurious testimony was given in response to a question that was ambiguous as a matter of law.

Whether the Circuit Court erred in not reversing petitioner's conviction for perjury on the ground that the decision of the Bankruptcy Court on which the Circuit Court relied in reversing petitioner's conviction for embezzlement on grounds of res judicata was also res judicata as to petitioner's conviction for perjury.

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REPORT OF OPINIONS BELOW

The opinion of the Sixth Circuit Court of Appeals affirming petitioner's conviction for perjury and reversing petitioner's conviction for embezzlement is not officially reported but a copy of the opinion is set forth in the Appendix hereto as Exhibit A. The order denying petitioner's petition for rehearing is set forth in the Appendix hereto as Exhibit B. The bankruptcy court opinion on which the Sixth Circuit relied in reversing petitioner's conviction for embezzlement on grounds of res judicata, and on which petitioner relies for his argument that his conviction for perjury should also be reversed, is reported at 50 B.R. 852 (N.D. Ohio, 1985). A copy of that opinion has also been included in the Appendix hereto as Exhibit C.

JURISDICTIONAL STATEMENT

The opinion and order of the Sixth Circuit Court of Appeals was dated and entered on August 24, 1988. Petitioner's petition for rehearing before the Sixth Circuit was denied in an order issued and entered on October 13, 1988.

The jurisdiction of this Court is invoked under 28 U.S.C. 1954, in that petitioner petitions from the final judgment and order of the Sixth Circuit Court of Appeals affirming petitioner's conviction for perjury on Count III of the government's indictment.

STATEMENT OF THE CASE

Petitioner, Quentin M. Derryberry II, is a lawyer currently under temporary suspension by the Supreme Court of the State of Ohio pending resolution of all of petitioner's appellate rights in this matter. Prior to his suspension in September of 1987, petitioner had been a practicing attorney for approximately fifteen years in the State of Ohio. During all of those years and, in fact, preceding his admission to the bar in Ohio, petitioner served as a bankruptcy trustee in the United States Bankruptcy Court for the Northern District of Ohio, Western Division.

In the latter part of 1981, petitioner was appointed as trustee in the bankruptcy matter of In Re James R. Hartley d/b/a Hartley Trucking Co.,

Case No. 81-01855. Shortly after his appointment as trustee for the Hartley estate, petitioner was informed by one of the Hartley creditors of the identity of one Merle C. Weber. Mr. Weber was a self-proclaimed and self-styled "creditor's representative" who was working on behalf of certain creditors of the Hartley estate to help recover those creditors' claims. Petitioner met Mr. Weber in November, 1981 and was impressed with Weber's knowledge of the affairs leading to the downfall of the Hartley Trucking Company. Over the course of the next few months, petitioner worked closely with Mr. Weber, drawing on Weber's knowledge of Hartley's business. In December, 1981, after petitioner had discussed with an attorney, Mr. George Ferstle, the possibility of Mr. Ferstle's acting as counsel for the

trustee in the Hartley matter, a meeting with certain creditors was held at petitioner's office. The purpose was to discuss the possibility of the creditors advancing funds for the purpose of paying Mr. Ferstle's attorneys fees so that he could prosecute actions on behalf of the Hartley estate and attempt to recover assets for the creditors. (Except for certain causes of action and some small amount of office equipment, the Hartley estate had no assets.) Petitioner attended only the first part of this meeting, despite the fact it was hosted in his office. At the conclusion of the meeting, there was no definitive agreement on behalf of the creditors to commit to advancing money to the estate for legal fees.

In early 1982 Mr. Weber offered to loan petitioner money for petitioner's

personal expenses. Petitioner was in need of funds because so much of his time was devoted to investigation of the Hartley matter for which petitioner was not receiving any current compensation and would not receive any compensation until such time as the bankruptcy court might approve an application for trustee's or attorney's[1] compensation. Petitioner accepted Mr. Weber's offer to loan him money. In the period of time from early January, 1982, to early March, 1982, petitioner received loans totalling approximately $22,500 from Mr. Weber. Unbeknownst to petitioner, at the same time that Mr. Weber was loaning petitioner money, Mr. Weber was also soliciting creditors of the Hartley estate to advance funds to the estate for

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[1]As an attorney petitioner was also able to represent the Hartley estate as counsel.

the prosecution of claims against third parties by the trustee.

Mr. Weber had some degree of success in his solicitations. In April, 1982, Mr. Weber informed Mr. Ferstle, counsel for the trustee, that he was holding a certain sum of money (he did not identify the amount) which he had obtained from creditors of the Hartley estate for the purpose of establishing a litigation fund. Mr. Ferstle, after consulting with petitioner on this matter, drafted an Application for Instructions and Advice to be presented to the bankruptcy court, Judge Krasniewski, for determination of: 1) whether or not the trustee could accept the funds held by Mr. Weber in order to utilize them for a litigation fund; 2) if so, under what conditions could the funds be accepted; and 3) would the advancement of such funds receive an

administrative priorty in the bankruptcy proceedings. The Application was presented to the bankruptcy court and a hearing was held thereon on May 27, 1982. At that time Judge Krasniewski determined that the trustee was authorized to accept the funds in question if they were tendered to him, but that there could be no limitation placed on the trustee's use of such funds by the creditors. (The trustee was known to be contemplating filing actions against certain Hartley creditors, in particular The Peoples Banking Company of McComb("McComb Bank"). Such creditors were more than hesitant to contribute to a litigation fund to help support litigation which might ultimately be directed at themselves.) Judge Krasniewski entered an order on June 4, 1982, embodying his ruling at the May 27 hearing. By a hand-written attachment to

that order, the funds then being held by Mr. Weber were first identified by amount and contributor and totalled $13,880.

After the June 4 order, petitioner essentially left the matter of the funds being held by Mr. Weber to his counsel, Mr. Ferstle, whose fees were to be paid out of any litigation fund. Mr. Weber did not offer to tender the fund to petitioner or his counsel, Mr. Ferstle. In the latter part of 1983 when petitioner as trustee was preparing cases to file against various entities, including McComb Bank, petitioner made inquiry of Mr. Weber as to whether or not he was going to tender the funds which were the subject of the June, 1982 order. Mr. Weber informed petitioner at that time that he did not know whether he was still authorized by the creditors to

tender such funds to petitioner.

In November 1983, after petitioner had filed an action on behalf of the Hartley Estate against the McComb Bank, the Bank, acting for itself and on behalf of all creditors of the Hartley estate, the largest of which creditors was the United States government, brought a motion to remove petitioner as trustee of the Hartley estate and an action on petitioner's bond to recover certain funds which McComb Bank alleged were property of the Hartley estate and which petitioner had failed to take control of for the estate. Specifically the funds in question consisted of the $13,880 which the Bank alleged had been given by various creditors of the Hartley estate to Mr. Weber as contributions for a litigation fund. McComb Bank originally contended that it had given $6,000 to Mr.

Weber for the litigation fund but later changed its position to reflect a contribution of $3,500. The Bank contended that by virtue of the Bankruptcy Court's June 4, 1982 order, petitioner was under an obligation to collect "the $13,880" from Mr. Weber and that he failed to do so.

The trial in the Bankruptcy Court on the motion to remove petitioner as trustee of the Hartley estate and on the action against petitioner and his bonding company to recover the funds purportedly given by creditors to establish the litigation fund did not take place until April of 1985. The evidence adduced at trial was to the following effect. Petitioner freely admitted that he had received personal loans from Mr. Weber in 1982 and 1983 in the amount of approximately $27,500. (Apart from the

$22,500 loaned to petitioner by Mr. Weber in January, February and March, 1982, petitioner and his wife accepted an additional loan of $5,000 from Mr. Weber in February, 1983.) Petitioner identified a $3,500 cashier's check drawn on McComb Bank made payable to petitioner individually, with no mention of his position as trustee of the Hartley estate, as being one of two cashier's checks drawn on the McComb Bank that Mr. Weber had given to petitioner as part of the loan transactions between Mr. Weber and petitioner. The other check was for $2,500. [2] As previously noted, the Bank had originally contended that its contribution to the alleged Hartley litigation fund was $6,000 but then

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[2]Petitioner had in fact informed the court of the loan transactions with Mr. Weber over a year earlier in February of 1984.

stated its contribution was only $3,500.

Mr. O.J. Huffman, president of the Bank, testified in the bankruptcy proceeding that the same $3,500 check identified by petitioner as being part of his personal loan transactions with Mr. Weber was, in fact, the check which the Bank had issued for its contribution to the Hartley litigation fund and which the Bank had given to Mr. Weber to give to petitioner for that purpose.

Petitioner testified that in late April of 1982, he was first informed by his counsel, Mr. Ferstle, that Mr. Weber was holding an undisclosed amount of money received from certain creditors of the Hartley estate which those creditors wished to contribute to a litigation fund. Pursuant to this information, petitioner, acting through his counsel, submitted to the bankruptcy court the Application for Instructions and Advice,

prepared by petitioner's counsel and Mr. Weber, seeking to determine whether petitioner as trustee could receive this money, use it as a litigation fund, and if so, under what conditions it could be received.

Bankruptcy Judge Krasniewski entered his order of June 4, 1982 authorizing petitioner to accept the funds, if tendered. In response to requests by petitioner over the course of the next year, Mr. Weber did not tender the funds to petitioner, stating that he was not sure that he was still authorized by the creditor-contributors to do so. In November 1983, petitioner was informed by one of the creditor-contributors, C. Richard Gottfried, that the check which Mr. Gottfied had given Mr. Weber for the fund had actually been made out to petitioner as trustee and had been endorsed by Mr. Weber purportedly as

agent for the trustee. Thereafter petitioner undertook an action against Mr. Weber to collect the funds, utilizing as his basis for the action the forged endorsement on Mr. Gottfried's check. Petitioner obtained a default judgement against Mr. Weber in the amount of $13,880. However, petitioner was unable to collect on the judgement. Although Mr. Weber had exhibited to petitioner in February of 1984 a copy of a passbook from an account in an Arizona bank in which "the $13,880" was purportedly kept, when petitioner sought to execute on the account it was discovered that the account was in the name of Mr. Weber's son and had never had more than $500 in it.

After hearing all the evidence, on June 20. 1985, Judge Krasniewski issued his Memorandum Opinion and Order. (See Appendix, Exhibit C; also reported at 50

B.R. 852 (N.D. Ohio, 1985.) In that opinion the court found that its order of June 4, 1982 did not obligate the trustee to collect the funds held by Mr. Weber but rather merely authorized the trustee to accept the funds and that contrary to the McComb Bank's contention, the funds were not property of the estate. (Appendix, Exhibit C, pp. 30-31; 50 B.R. 861) The court also stated:

> The $13,880 was never turned over to the trustee by Mr. Weber.
>
> ****
>
> The uncontroverted testimony at trial was that the creditors gave the money to Mr. Weber. One of those contributors was Peoples Bank which gave $3,500 to Mr. Weber. Further evidence that the funds were put in Mr. Weber's control by the creditors is found in the Trustee's Application for Instructions and Advice filed April 30, 1982. That document which sought advice from the court on the propriety of accepting $13,880 from the creditors stated that the money was deposited with Mr. Weber. <u>There being no evidence that the money was ever presented to the Trustee</u> the Court

> must find that the allegation that he allowed it to fall into the hands of Mr. Weber is completely without merit.

See, Appendix Exhibit C, pp. 8, 27 and 28; 50 B.R. 852 at 856, 860. (Emphasis added.) The Bankruptcy Court, therefore, denied the creditors' petition for removal of the trustee and dismissed the creditors' action for recovery of damages against the trustee and his bonding company.

In spite of the full and fair hearing before the Bankruptcy Court, for which the government, as the largest creditor of the Hartley Estate, was given notice and an opportunity to participate, the government would not abide by the Bankruptcy Court's decision. In August of 1986 the government charged petitioner in a four count indictment. Count I charged petitioner with conspiracy with Mr. Weber to embezzle the $13,880 from

the Hartley Estate. Count II charged petitioner with embezzlement from a bankruptcy estate, in violation of 18 U.S.C. Section 153, of $8,500 of the $13,880, consisting of the $3,500 check from McComb Bank and $5,000 from another creditor, Midwest Insurance.These latter funds Mr. Weber had informed petitioner were funds owed to Mr. Weber personally by Midwest. Count III charged petitioner with perjury in violation of 18 U.S.C. section 1623,in his testimony before the Bankruptcy Court in the April, 1985 hearing when counsel for the McComb Bank asked petitioner, "Have you ever had possession of any of that $13,800?" and petitioner responded "No, Sir." Count IV also charged petitioner with perjury in the April, 1985 hearing in that petitioner informed the Bankruptcy Court that he had no knowledge of Mr. Weber's forged endorsements on certain checks

which had been made out to petitioner and which comprised part of "the $13,880" until he received the letter from Mr. Gottfried in November, 1983.

Petitioner moved to dismiss the indictment on the grounds of the res judicata and collateral estoppel effects of the Bankruptcy Court ruling and, specifically with respect to Count III, on the grounds that petitioner's perjurious testimony was given in response to an inherently ambiguous question. The trial court denied the motion to dismiss the indictment and petitioner proceeded to trial in January, 1987 before a jury. The jury returned its verdict on January 30, 1987, finding petitioner not guilty of conspiracy with Mr. Weber to embezzle funds from the Hartley estate; guilty of embezzling the $8,500 from the Hartley estate, and guilty of perjury in saying that he had

never had possession of any of that $13,880. The jury reached no verdict with respect to Count IV and the district court entered judgment of acquittal thereon.

On appeal, the Sixth Circuit adopted the government's statement of facts from its brief without considering that petitioner had presented contrary evidence in the trial court. Nevertheless, after chastising petitioner in dicta, the Sixth Circuit ruled that the bankruptcy court proceedings were res judicata with respect to the charges of embezzlement in Count III and reversed the judgment of the trial court on that count. The Sixth Circuit affirmed the trial court's judgment on the perjury charge in Count III, finding that there was no ambiguity in the question posed to petitioner. Petitioner filed for rehearing in the Sixth Circuit, again

pointing to the ambiguity of the question and the fact that the res judicata finding in Count II was equally applicable to the charges in Count III. The Sixth Circuit denied the petition for rehearing in a one line order.

ARGUMENT

Petitioner's conviction for perjury on Count III of the government's indictment must be reversed because of the inherent ambiguity in the question asked and because of the res judicata and collateral estoppel effects of the Bankruptcy Court order of June 20, 1985. In Bronston v. United States, 409 U.S. 352 (1973), this Court was presented with a case in which the defendant was charged with perjury in a federal bankruptcy proceeding. The defendant, testifying under oath, had been asked whether he currently had any bank accounts in Swiss banks. He responded, no. He was then asked whether he had ever had any such accounts. He responded that his company had an account there for about six months. Defendant made no direct response to the question. The government indicted the defendant for perjury based

on its evidence that defendant had maintained a personal bank account in Switzerland at one time. Defendant was convicted by a jury and this Court granted the writ of certiorari. The Court reversed the defendant's conviction for perjury, finding that a witness could not be convicted of perjury for giving an answer under oath that is literally true, albeit unresponsive and arguably misleading by its negative implication. This Court stated that "The burden is on the questioner to pin the witness down to the specific object of the questioner's inquiry...precise questioning is imperative as a predicate for the offense of perjury." 409 U.S. at 360 and 362.

In the case presently before this Court, the basis of petitioner's conviction for perjury is that when he was asked whether he had ever had any of "the $13,880" he responded, "No, sir."

The government's contention at trial was that the $3,500 McComb check and the $5,000 Midwest check were part of "the $13,880" and that petitioner, therefore, perjured himself in his denial. The inherent ambiguity of the question presented petitioner is obvious from the fact that petitioner, in the same proceeding in which he denied having any of "the $13,880," readily admitted that he had received the $3,500 McComb Bank check and had received other funds from Mr. Weber, part of which, had he been asked to identify them, consisted of the $5,000 Midwest check. It would have been patently absurd for petitioner to deny ever having had any of "the $13,880," if he thought that the reference to "the $13,880" in counsel's question included the very funds which he had already testified to receiving. However, his denial of receiving any of "the $13,880"

is perfectly consistent with the understanding that " the $13,880" was the amount purportedly held by Mr. Weber in a separate account at the time of the hearing on the Application for Instructions and Advice in May, 1982.

Apart from the patent absurdity of petitioner testifying to a denial of ever having had any of "the $13,880" if he understood the term to indicate the very funds which he had already testified to receiving, the Bankruptcy Court also did not understand petitioner's testimony in the light portrayed by the government. In the April, 1985, trial Judge Krasniewski heard Mr. Huffman say that McComb Bank had contributed the $3,500 check to a litigation fund in February, 1982. That same amount was identified in the June, 1982 Order as being the amount given by McComb Bank to Weber for the litigation fund. Judge Krasniewski heard

petitioner testify that he had received that same $3,500 check from Weber as part of a loan. The Bankruptcy Court heard petitioner testify he had received $24,000 in other funds from Weber as part of that loan, including $11,000 in January, 1982, which, in part, was derived from the $5,000 Midwest Insurance check. Judge Krasniewski heard Mr. Clark, the Bank's attorney, specifically ask defendant whether or not he, petitioner, had ever had any of "the $13,880." Petitioner responded "No, sir."

Judge Krasniewski, no less than the defendant, understood that question to mean something different than the government's interpretation of the question. In the face of the flat out admission by the defendant that he had received the same $3,500 check which Peoples Bank of McComb claimed was its

contribution to the litigation fund and had received the additional $5,000 in January, 1982, which could have been shown to be the purported Midwest contribution to the litigation fund, Bankruptcy Judge Krasniewski found that "the $13,880 was never turned over to the trustee by Mr. Weber...and that there was no evidence that the money was ever presented to the trustee." (Appendix, Exhibit C, pp.8, 27 and 28.)

Judge Krasniewski obviously understood defendant's response not to mean that he had never received the $3,500 check or the $5,000 check from Midwest, but rather that he had not received any of "the $13,880" which Weber informed petitioner, petitioner's counsel, the Bankruptcy Court and various creditors he was holding as the contributions of various creditors to a litigation fund. The government's understanding of the

question when juxtaposed with the Bankruptcy Court's obvious understanding of the question, underscores the inherent ambiguity of the question and mandates that such a question should not, as a matter of law, have been presented to a jury as the basis for an indictment for perjury.

Moreover, the Bankruptcy Court's findings in its June 20, 1985, Order, stating that "the $13,880 was never turned over to the Trustee by Mr. Weber" and that there was "no evidence that the money ("the $13,880") was ever presented to the trustee, act as res judicata and collateral estoppel of an essential element of the government's indictment for perjury in Count III. That is, that the testimony of the defendant in response to the question was false. Judge Krasniewski heard the testimony of both Mr. Huffman and petitioner. For

reasons made very clear in his Opinion and Order, he believed petitioner. As a matter of law, therefore, Judge Krasniewski's Opinion is conclusive of the factual determination of whether or not defendant's testimony is false.

For the reasons hereinbefore set forth, petitioner Quentin M. Derryberry II prays that this Honorable Court grant this Petition for Certiorari and reverse petitioner's conviction for perjury on Count III of the government's indictment.

Respectfully submitted,

_____

Attorney for Petitioner
Quentin M. Derryberry II

George Pappas
Walsh, Neville,
Pappas & Mahoney
221 N.LaSalle Street
Suite 2100
Chicago, Il. 60601
(312) 263-1900

Of Counsel:
Kenneth W. Sullivan
221 N.LaSalle Street
Suite 2100
Chicago, Il. 60601
(312) 346-7600

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Of Counsel:
Kenneth W. Sullivan
221 N. LaSalle Street
Suite 2100
Chicago, IL 60601
(312) 346-7600

George Pappas*
Walsh, Neville,
Pappas & Mahoney
221 N. LaSalle
Street
Suite 2100
Chicago, IL 60601
(312) 236-1900

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Record

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Of Counsel:
Kenneth W. Sullivan
221 N. LaSalle Street
Suite 2100
Chicago, IL 60601
(312) 346-7600

George Pappas*
Walsh, Neville,
Pappas & Mahoney
221 N. LaSalle
Street
Suite 2100
Chicago, IL 60601
(312) 236-1900

*Counsel of
Record

INDEX TO APPENDIX

Appendix A

Opinion and Order Sought to be Reviewed
(18 pages)

Appendix B

Order on Motion for Rehearing
(2 pages)

Appendix C

United States of America, ex rel.
v. Quentin M. Derryberry II, Trustee

Published at 50 B.R. 852
(51 pages)

NOT RECOMMENDED FOR FULL TEXT PUBLICATION
See Sixth Circuit Rule 24

Nos. 87-3458, 87-3638

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

QUENTIN M. DERRYBERRY, II,

Defendant-Appellant

ON APPEAL FROM THE UNITES STATES
DISTRICT COURT FOR THE NORTHERN
DISTRICT OF OHIO

APPENDIX A

Before: MARTIN and WELLFORD, Circuit Judges; and JARVIS, United States District Judge for the Eastern District of Tennessee, sitting by designation.

PER CURIAM. Quentin M. Derryberry, II, the defendant, appeals his jury conviction for embezzlement of bankruptcy funds and perjury. We have reviewed the defendant's numerous assignments of error and find those relating to his embezzlement conviction sufficient to merit the reversal of that conviction. The conviction and sentence for perjury is, however, affirmed.

This case has its origins in September 1981, when James Hartley, owner of Hartley Trucking Company, filed for bankruptcy. The trustee for his bankruptcy was Quentin M. Derryberry, II, the defendant. Derryberry worked closely with an individual whose name was Merle Weber. For reasons we have not fathomed, they reached the conclusion that there may be hidden

assets available for creditors in the Hartley bankruptcy.

In November of 1981, the defendant and Mr. Weber met with attorney George Ferstle to discuss the formation of a creditors' fund. This fund would be used to pay for an attorney for the Trustee and to defray investigative costs incurred in finding the hidden assets. The fund would be created through contributions secured from the creditors. Among the creditors expected to contribute were Mid-West Insurance Agency, the Peoples Banking Company of McComb, and C. Richard Gottfried.

On December 16, 1981, the defendant held a creditors meeting to discuss the establishment of this creditors' fund. The defendant indicated that Weber would serve as an investigator and they would work together. The defendant informed them that he had retained Ferstle as his attorney. The defendant also informed the creditors

that he needed approximately $75,000 to pursue the necessary litigation. After the meeting, Weber contacted several of the Hartley creditors. Several of these creditors gave checks to Weber which were made out to the defendant. On December 18, 1981, Mr. Gottfried gave Weber a $2,000 check made out to the defendant to be used for the creditors' fund. The check contained a notation which read "Expense fund - Hartley recovery." On January 8, 1982, Mid-West gave Weber a $5,000 check made payable to the defendant for the creditors' fund. After receiving the check from the owner of Mid-West, he gave it to the defendant who endorsed it and deposited it in his personal checking account at the Metropolitan Bank of Lima, Ohio before spending it for his own personal use.

Other creditors also made contributions with checks payable to the defendant. In January of 1982, Weber endorsed these

checks "Quentin Derryberry II, by Merle C. Weber, by agreement; Merle C. Weber." The checks were then deposited into Weber's personal checking account at the Peoples Bank. The $2,000 check received from Mr. Gottfried was treated in a similar manner.

In January of 1982, the chief executive officer of the bank asked Weber about the strange endorsements. Weber replied that he and Derryberry had agreed to endorse the checks in this manner. On January 13, 1982, Mr. Huffman called Derryberry and told him about the endorsements Weber was making on the checks contributed by various members of the creditors' fund. Derryberry acknowledged that he had agreed to these endorsements. On February 22, 1982, the defendant was again informed by Mr. Huffman of these endorsements and again stated that there was no cause for worry.

On March 22, 1982, Mr. Drake from Peoples Bank called the defendant and

informed him that checks from creditors were being endorsed by Weber. This time, however, defendant claimed he was not aware of this and that he would discuss it with Weber. The defendant promised to get back to Mr. Drake. When he did not do so, Mr. Drake called Ferstle on March 30, 1982. Mr. Drake told Ferstle that Weber was writing checks to Derryberry which were being deposited to the account of Derryberry's wife's business. This information was relayed to the defendant. On April 16, 1982, Drake and Huffman went to Ferstle's office to speak with Derryberry about the endorsements. Derryberry refused, however, to meet with them.

On January 14, 1982, Mr. Huffman called the defendant to advise him that the bank had approved a contribution to the creditors' fund. Ferstle apparently advised defendant not to accept the

contribution if there were conditions attached to it. On February 26, 1982, Mr. Huffman gave Weber a $3,500 cashiers check made payable to defendant. The check contained the notation "For PBC-Creditors' Group." Weber gave the check to the defendant who endorsed it, deposited it into his personal checking account and spent the money for his own personal use.

In April of 1982, Ferstle prepared a document entitled Application for Instructions and Advice which sought guidance from the bankruptcy court concerning the handling of the creditors' fund money. The Application included an exhibit which listed each contribution by source and amount. On May 27, 1982, Mr. Ferstle informed Judge Krasniewski that between $12,000 and $13,000 had been collected from the creditors and was being held by Weber in escrow awaiting instructions from the bankruptcy court.

The defendant was in attendance at this hearing, during which hearing Mr. Drake stated that the Peoples Bank had made an unconditional contribution to the creditors' fund. The court made it clear, in the defendant's presence, that Weber was to have no contact or participation in this fund whatsoever.

On June 4, 1982, the bankruptcy court issued its formal order concerning the creditors' fund. The order included a listing of the creditors and their contributions. The list included the Peoples Bank's contribution of $3,500 and Mid-West's contribution of $5,000. A copy of the order was sent to the defendant.

From the time of the court order until January of 1984, defendant did nothing to acquire the money from Weber. Only after questions began to be raised by some of the creditors about what had happened to their contributions did the defendant make any

effort to get the money returned from Weber. On November 30, 1983, Mr. Gottfried sent a letter to the defendant that specifically mentioned his contribution of $2,000. He received no response. In November 1984, the Peoples Bank filed a motion to remove the defendant as Trustee. Shortly thereafter, defendant filed suit against Weber seeking the money from the creditors' fund. The defendant informed the court that the money "was property of the estate." The court granted the defendant's motion.

On September 7, 1983, defendant was interviewed by a special agent with the Federal Bureau of Investigation. The defendant informed Agent Downey that he had received approximately $20,000 in loans from Weber. Defendant also informed the agent that Weber had given him a ~~$5,~~000 check from Mr. Bundschuh but that he had returned the check to Weber because

Bundschuh was a creditor in the Hartley bankruptcy.

In April of 1985, defendant testified before Judge Krasniewski at a hearing on the suit instituted by the Peoples Bank to remove him as trustee of the Hartley estate. He testified at that hearing that he never had possession of any of the $13,880 which constituted the creditors' fund. Specifically, after stating that "I'm familiar with the figure that is $13,880," he was asked whether he had "ever had possession of any of that $13,880?" His answer, under oath, was "No Sir." It was this testimony that formed the basis for the perjury count on which he was convicted.

There was also an exchange during the defendant's April 26, 1985, testimony to the grand jury in which he stated that he "had not been informed at any time by anyone factually, or even had a suspicion,"

that Mr. Weber had endorsed his name on the back of any checks. This testimony formed the basis of a second perjury count. The jury, however, was unable to reach a unanimous verdict on this charge.

On August 6, 1986, a four count indictment was handed down against the defendant. Count two of the indictment charged that the defendant in January and February 1982 embezzled property belonging to the estate of a bankrupt in violation of 18 U.S.C. Section 153. Count one charged him with conspiring with Merle C. Weber to do the embezzling, in violation of 18 U.S.C. Section 371. Counts three and four charged him with perjury as described above. On January 30, 1987, the jury returned verdicts of guilty on counts two and three and not guilty on count one. The jury came to no agreement on count four. On May 4, 1987, a judgment of guilty on counts two and three was entered by the

trial court.

Defendant's first argument is that because the money he is charged with embezzling was not "property of the estate," he cannot be guilty of violating 18 U.S.C. Section 153.[1] Defendant argues that only if the bankrupt debtor had an interest in the property at the beginning of the bankruptcy proceedings can the property be said to be "property belonging to the estate of a debtor" within the meaning of 18 U.S.C. Section 153. We disagree. We believe that 11 U.S.C. Section 541(a)(7), which defines property belonging to the estate, makes clear that the estate may acquire an interest in

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1. 18 U.S.C. Section 153 provides:

Whoever knowingly and fraudulently appropriates to his own use, embezzles, spends, or transfers any property or secretes or destroys any document belonging to the estate of a debtor which came into his charge as trustee, receiver, custodian, marshal, or other officer of the court, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

property after the commencement of the case. Thus, we believe that money which has been given to the estate for the purpose of funding litigation by a Trustee on behalf of that estate is property of the estate under the bankruptcy laws. We are unpersuaded by defendant's argument that the definition of "property of the estate" in Section 541 is not determinative of the definition of the virtually identical language continued in Section 153. If the purposes of the bankruptcy laws in general are to protect creditors by ensuring equal distribution of the property of the estate among the creditors, the specific purpose of Section 153 is to further protect the creditors by prohibiting the Trustee, who is supposed to be acting on behalf of the creditors, from embezzling any of that property for his own personal gain.

Defendant's second argument is that he was wrongfully convicted of perjury on the

ground that his testimony that he had never had possession of "any of that $13,880" was in response to an ambiguous question. Defendant would have us believe that he was unclear to what "that $13,880" was in reference to. His testimony at the April 24, 1985, hearing belies that contention. Immediately preceding his testimony that he had never had possession of any of that $13,880, the defendant testified that "I am familiar with the figure that is $13,880." The cases upon which defendant relies offer him no support. In contrast to the cases cited by defendant, the defendant's testimony here was literally false. We flatly reject defendant's argument that perjury and attempts to mislead a court may be excused by later testimony in response to another question, where he admitted having received a $3,500 check from the Peoples Bank.

Defendant's third argument is that the

trial court erred in ruling that his allegedly perjurious declaration was material as a matter of law. As defendant recognizes, the question of materiality in a perjury case is one of law, for the court to decide. United States v. Richardson, 596 F.2d 157, 165 (6th Cir. 1979). Defendant argues that the government failed to present any evidence that would enable the district court to find that the defendant's declaration was material. The government, however, did submit to the district court the June 20, 1985, Order of Judge Krasniewski. Thus, the court was informed as to what issues were involved in the bankruptcy hearing. Accordingly, we believe the district court could conclude from this evidence and the perjurious statements that the statements were material. The form of the evidence presented is not as important as whether the evidence is sufficient to inform the

court as to the materiality of the testimony. The introduction of a complete transcript of the relevant proceedings is not the exclusive method of proof. See United States v. Bell, 623 F.2d 1132, 1135 (5th Cir. 1980).

The defendant's most persuasive argument is that the final order and judgment of the bankruptcy court in United States ex rel. Peoples Banking Company of McComb v. Quentin M. Derryberry II, Trustee, (In re Hartley), 50 B.R. 852 (Bankr. N.D. Ohio, W.D. 1985), where it found that the funds described in Count II of the indictment were not "property belonging to the estate of [the] debtor," collaterally estops or acts as a res judicata bar to the elements charged in Count II of the indictment. Id. at 860. We have reviewed and considered the various orders of the bankruptcy court and agree with defendant that they appear inherently

contradictory on the very issue at the core of Count II of the indictment. The June 20, 1985, Order holds that "the Trustee was merely authorized to receive the creditors' funds and that, contrary to Peoples Bank's interpretation, the funds were not property of the estate which he had a duty to collect." Because the United States was a named party in this bankruptcy matter, whose interests were adequately aligned with and represented by Peoples Bank on this issue, we believe the United States was not free to relitigate this issue and make the charge found in Count II. Because this is a criminal case, it is a matter of constitutional mandate that such judicial orders and determinations be strictly interpreted when they are apparently dispositive on issues central to a criminal charge. We recognize that bankruptcy Judge Krasniewski had issued other orders implying a different conclusion on the

critical question of whether these funds belonged to the debtor's estate, but fundamental fairness requires that the benefit of the doubt be given to a criminal defendant.

Accordingly, we reverse the embezzlement conviction charged in Count II of the indictment and affirm the perjury conviction and the sentence.

WELLFORD, Circuit Judge, concurring:

I concur fully in the per curiam opinion, and write only to emphasize our puzzlement about Bankruptcy Judge Krasniewski's conflicting and inexplicqable actions in the underlying bankruptcy case. I cannot fathom why Judge Krasniewski did not discharge the defendant as trustee at an earlier stage in the proceedings. Moreover, I do not understand why he would declare the creditors' fund not to be property of the bankruptcy estate on June 20, 1985 after having declared the exact opposite on several previous occasions. This latter action prompts us to set aside the conviction charged in count two of the indictment.

ISSUED AS MANDATE: November 2, 1988

Nos. 87-3458, 87-3638

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

QUENTIN M. DERRYBERRY, II,

Defendant-Appellant.

ORDER ON MOTION FOR REHEARING

APPENDIX B

Before: MARTIN and WELLFORD, Circuit Judges; and JARVIS, District Judge.*

This matter is before the court upon the motion of appeallant requesting a reconsideration of the court's order of August 24, 1988.

Upon consideration of the matter it is ORDERED that the motion be, and it hereby is, denied.

ENTERED BY ORDER OF THE COURT

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CLERK

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*The Honorable James H. Jarvis II, United States District Judge for the Eastern District of Tennessee, sitting by designation.

In re James Ross HARTLEY, Sharon Lee Hartley, Debtors.

The UNITED STATES of America, ex rel. The PEOPLES BANKING COMPANY, Plaintiffs,

v.

Quentin M. DERRYBERRY, II Trustee et al., Defendants.

Bankruptcy No. 81-01855

Adv. No. 83-0817

United States Bankruptcy Court
N.D. Ohio, W.D.

June 20, 1985

Published at 50 B.R. 852

APPENDIX C

OPINION AND ORDER

WALTER J. KRASNIEWSKI, Bankruptcy Judge

This matter came on for trial on April 25, 1985 upon the motion of The Peoples Banking Company, McComb, Ohio (Peoples Bank) to remove Quentin M. Derryberry, II, as Trustee of the estate of James Ross Hartley and Sharon Lee Hartley, and upon its adversary complaint seeking damages against the Trustee and his surety for alleged violation of duties under the Bankruptcy Code in the administration of the estate. The proceedings were consolidated for trial since common issues of fact and law were involved. Peoples Bank based its entitlement to relief on the following grounds:

1. Failure to take possession of money advanced by creditors for a litigation fund.

2. Conflict of interest arising from the Trustee's ownership of 21 shares of Peoples stock in the Miller estate and the

Trustee's law suit against Peoples Bank in the Hartley case.

3. Loss of estate funds due to a failure to obtain third party endorsement on insurance checks.

4. Failure to take possession of trucks owned by the debtor thereby allowing an administrative claim to be filed against the estate for storage costs.

5. Failure to recover preference payments.

6. Failure to rent or sell the debtors' home.

The court finds that the standard to be applied in removing a trustee is one that requires actual fraud or harm to the estate. Under that standard the Court finds that Peoples Bank has not shown cause for removal. Peoples Bank has also failed to prove grounds for liability on the part of the trustee or his surety. Therefore it's request for judgment must be denied in

both proceedings.

FACTUAL BACKGROUND

On September 8, 1981 the debtors, James Ross Hartley and Sharon Lee Hartley, filed a voluntary petition under Chapter 7 of the Bankruptcy Code. Pursuant to an order of the court, Quentin M. Derryberry, II, was then appointed trustee of the estate.

In December of 1981, the Trustee invited representatives of several of the creditors of the estate to attend a meeting in his office. Among those parties participating in the meeting were representatives of the Union Oil Company of California (Union Oil) and Peoples Bank. At the meeting, the Trustee discussed, among other things, (855) the prospects of recovery for creditors of the estate. In the view of the Trustee, considering the assets of the estate and the scheduled claims, the only substantial prospects for

recovery by the creditors lay in the Trustee's pursuit of certain litigation on behalf of the estate. In order to pursue such litigation, the Trustee solicited funds from the parties in attendance. As a result of the meeting, Union Oil offered funds to the Trustee on terms he found unacceptable and which he rejected.

The other significant action originating from the December meeting was that several creditors deposited funds with Merle C. Weber for the purpose of creating a litigation fund which would be made available to the Trustee. Mr. Weber was present at the meeting because he had been hired by several creditors to recover funds owed them by Mr. Hartley. Also Mr. Weber was sharing whatever information he gathered from his investigations with the Trustee. All of the parties believed Mr. Weber would aid the estate in pursuing litigation that would result in the

recovery of enough money to pay all of the creditors' claims.

In response to the creation of the creditors' fund the Trustee filed an Application for Instructions and Advice regarding the propriety of his accepting those funds for purposes of investigation and possible pursuit of litigation on behalf of the estate. In that application the Trustee stated that he was receiving information from Mr. Weber who was working for some of the creditors. The application also stated that the litigation fund had been deposited with Mr. Weber.

On June 4, 1982, after a hearing on notice to all creditors, the court entered an "Order on Application of Trustee for Instructions and Advice." There being no objections to such application, and the court finding that the grant of the application would be in the best interests of the estate and its creditors, the court

Ordered the following:

[T]hat the Trustee be, and is hereby, authorized to accept the sums set forth in Exhibit A from the creditors listed therein and to accept additional sums subject to the provisions and conditions of this Order as follows:

1. The sums shall be received by the Trustee as unsecured borrowings under Section 364 of the Bankruptcy Code (11 U.S.C. Section 364) and shall be allowable as an administrative expense under Section 503(b)(1) of the Code (11 U.S.C. Section 503(b)(1)).

2. The Funds received hereunder shall become assets of the estate and be deposited by the Trustee in a separate account, and shall not be co-mingled with other monies of the estate.

3. The Trustee shall promptly report the receipt of additional funds to the Court, furnishing the name of the

contributor, the amount contributed and the date of receipt.

4. The funds may be used only upon application to and prior Order of this Court.

5. The funds received hereunder shall be under the exclusive control of the Trustee and not of the creditor or creditors contributing the same, subject only to Orders and supervision of this Court.

6. The funds received hereunder shall be used for the purpose of investigating into possible fraudulent conveyances, preferential transfers and/or other actions seeking the recovery of assets for the benefit of the estate and the creditors.

7. The trustee shall account to the Court for all funds received hereunder heretofore or hereafter, which accounts shall be available for inspection by creditors.

The following creditors made contributions to the litigation fund which were paid directly to Mr. Weber:

The Peoples's Banking Company of McComb, Ohio	$3,500.00
Mid-West Insurance Agency, Inc. of Piqua, Ohio	$5,000.00
R.J. Hall Co. of Carey, Ohio	$ 40.00
Paul A. Burson of Carey, Ohio	$2,000.00
Larry Taylor of Carey, Ohio	$ 200.00
C. Richard and Mary Ellen Gottfried of Upper Sandusky, Ohio (856)	$2,000.00
Kimmel Cleaners, Inc. of Upper Sandusky, Ohio	$ 100.00
Wolfe Kenworth of Perrysburg, Ohio	$ 100.00
Morral Oil Company of Morral, Ohio	$ 100.00
The Western Ohio Truck and Equipment Co. of Lima, Ohio	$ 200.00
Marvin Lee of Carey, Ohio	$ 140.00
Grover L. Rutter of Findlay, Ohio	$ 100.00
Southway Tire of Canton, Ohio	$ 400.00
	$13,880.00

The $13,880 was never turned over to the Trustee by Mr. Weber nor was any action taken by the creditors demanding the return or delivery of their contributions.

After the June 4th Order the Trustee made phone calls and wrote letters inquiring about the creditors fund but it wasn't until it was brought to the Trustee's attention that Mr. Weber had forged his endorsement on one of the checks that the Trustee instituted legal proceedings to obtain the money. The Trustee then filed an adversary proceeding, Case No. 84-0003, against Mr. Weber seeking a turnover of the money. On March 7, 1984 this Court entered a default judgment which directed Mr. Weber to deliver the litigation fund to the Trustee. Mr. Weber failed to comply with the Court Order so the trustee filed an application and Praecipe for Writ of Assistance on November 21, 1984 in the United States District Court for the District of Arizona, which requested that the United States Marshals seize a bank account in which the trustee believed the litigation fund was deposited.

It was discovered that the passbook number given to the Trustee actually belonged to Mr. Weber's son and it never had more than $500.00 in it. In yet another attempt to recover the $13,880 the Trustee filed an Application and Praecipe for Writ of Assistance in the United States District Court for the Northern District of Ohio in November, 1984, which requested that the United States Marshals seize the bond deposited with the court in Mr. Weber's criminal case. However, because Mr. Weber had filed a personal recognizance bond, no funds were deposited with the court, and the Trustee's application was denied. The Trustee has retained counsel in Phoenix, Arizona to enforce the bankruptcy court's judgment against Mr. Weber and he is currently continuing efforts to attempt to trace and recover the fund.

As evidenced by a letter dated January 13, 1982 from Merle Weber to O.J. Huffman

(President of Peoples), Mr. Weber had contractual agreements with a number of Hartley creditors. The letter stated "These agreements are standard and provide for my being paid 10% of the debts owed from recovered funds, and that a portion of that 10%, 2% of the debt claimed is paid upon execution of the employment agreement." Although in the January 13, 1982 letter, Mr. Weber swore his loyalty to the bank and offered to waive the pre-payment for the bank, Mr. Huffman testified the $26,000 advanced to Mr. Weber in October of 1981 to satisfy the 2% requirement was never returned.

Mr. Weber's relationship with Peoples Bank began in July of 1981, two months before the Hartleys declared bankruptcy. Various arrangements concerning Mr. Weber taking an equity position in the bank and his purchasing a $550,000 note by Hartley from the bank were agreed upon but never

consummated. On October 1, 1981, Peoples Bank in a letter signed by O. J. Huffman, granted Mr. Weber the authority to act for the bank to recover funds due it from Rentar Industries.

Mr. Huffman testified at trial that part of Peoples Bank's relationship with Mr. Weber included loans made to him during 1982 and 1983. One of those loans occurred in December of 1982. At the request of Mr. Weber, Mr. Huffman arranged to have money taken to a motel in Findlay for the purpose of it being delivered to Paul Gorman who was then an Assistant United States Attorney working on the Hartley case. Mr. Huffman made additional money available to Mr. Gorman and at some point Mr. Gorman came directly to the bank for a loan. The result of those transactions was that Mr. Weber and Mr. Gorman were convicted of violating 18 U.S.C. Sections 208 and 201 concerning conflict of interest as the

result of offering and (857) accepting gratuities, while Mr. Huffman was granted immunity for his testimony.

Beginning in 1982 and over the period of several months the Trustee and his wife accepted checks from Mr. Weber totalling $27,500.00 which were deposited in a personal checking account. The Trustee orally agreed to pay Mr. Weber as soon as he received compensation from the Hartley case.

In approximately June or July of 1983, the Trustee convened a meeting in Chicago, Illinois at the offices of Antonow & Fink. Representatives of Union Oil, an unsecured creditor of the Hartley estate for approximately $910,000.00, attended the meeting and were given draft copies of certain complaints the Trustee eventually filed in this Court and the United States District Court for the Northern District of Illinois. Upon review of the content of

these complaints, Union Oil agreed to lend the Trustee $25,000.00 subject to the approval of this Court.

On November 14, 1983 the Trustee filed a motion for authority to obtain secured credit pursuant to 11 U.S.C. Section 364(c) and to pay a retainer of $25,000.00 to the law firm of Antonow & Fink, his duly appointed counsel. After an extensive evidentiary hearing the court granted the Trustee's motion. See In re Hartley, 39 B.R. 273 (Bankr.N.D.Ohio 1984).

The court found that the Trustee entered into no written or oral agreement with Union Oil regarding the extension of credit. Also, there were no conditions imposed on the proffered money, although the Trustee did agree to provide Union Oil with a periodic assessment of the progress of the litigation.

Union Oil's expressed motivation in lending the funds was its belief, based

upon the evaluation of several of its own in-house counsel, that the Trustee may have some viable claim that would result in recovery of funds for the estate and itself as an unsecured creditor. In particular, the representatives of Union Oil testified that they felt that a certain preference action against the Peoples Bank had a significant probability of success. Union Oil viewed the $25,000.00 as "seed money" in that, if the preference action against Peoples Bank succeeded, adequate funding for the much broader litigation initiated or anticipated by the Trustee would be thus provided.

The Trustee subsequently filed adversary proceedings against three banks alleging fraudulent transfers, preferential transfers and racketeering activities. One of those proceedings was Case No. 83-0748 filed on September 7, 1983 against Peoples Bank consisting of a 6 count complaint

seeking judgment in the amount of $6,500,000.00.

On November 18, 1983 The Peoples Bank filed four adversary proceedings against the Trustee seeking damages in the Hartley, Peckinpaugh and Larry and Lucretia Miller cases as a result of alleged violation of his duties as trustee. The Trustee was served with courtesy copies of the four proceedings on November 18, 1983 in Courtroom 103 where the parties were assembled for a pretrial conference which was scheduled on the Trustee's complaint against Peoples Bank. When the Trustee's counsel inquired of Peoples' counsel as to the reason for filing the adversary proceedings against the Trustee he replied "because you drew first blood."

On November 30, 1983 motions to remove the Trustee were filed in the Peckinpaugh and Miller case, and on December 6, 1983 the Court received a motion to remove the

Trustee in the Hartley case.

On September 25, 1984 Mr. Huffman sent a letter to David J. Fickel, Estate Administrator for the United States Bankruptcy Court which called for the removal of Quentin Derryberry II from the roster of Trustees. The letter stated "of particular concern to me is the relationship between Mr. Derryberry and one Merle C. Weber of Phoenix, Arizona who is currently under indictment for allegedly loaning money to an Assistant United States Attorney investigating the Hartley bankruptcy. It would appear from the testimony of Mr. Derryberry at a hearing held in the Bank- (858) ruptcy Court on February 3, 1984, that Mr. Derryberry sought and accepted personal loans from Mr. Weber." Peoples Bank also sent a copy of that letter to Mr. James N. Cole, United States Attorney.

On April 15, 1985 this Court granted

the Trustee's Second Application to Obtain Credit from Union Oil for an additional $25,000 pursuant to 11 U.S.C. Section 344 and to Pay Additional Retainer to Antonow and Fink for the same reasons the first request had been granted and because no new objections had been raised.

On April 15, 1985, in the adversary proceeding instituted by the Trustee against Peoples Bank, this Court issued a proposed Order granting the Trustee's motion for partial summary judgment for recovery of a $500,000 preferential payment to The Peoples Bank of McComb under 11 U.S.C. Section 547(b).

DISCUSSION

The Bankruptcy Code at Section 324 gives the court the power to remove the trustee as follows:

> The court after notice and a hearing may remove a trustee or an examiner for cause

However it remains for the court to determine what constitutes "cause" on a case by case basis.

Case law reveals divergent standards have been applied in determining what constitutes cause to remove a trustee. Some of the courts professed to rule on the basis of the "best interest of the estate" or as a variation of that theme "avoiding even the appearance of impropriety." However most of the courts faced with alleged potential conflict of interest or potential wrongdoing hold that "potential conflicts of interest do not warrant the removal of a trustee" in the absence of "fraud and actual injury". In re Freeport Italian Bakery Inc., 340F.2d 50, 54 (2nd Cir.1965).

In Bollman v. Tobin, 239 F. 469, 473 (2nd Cir.1917) use of the "best interest of the estate" standard allowed a judge to remove a trustee while "completely exonerating [him] from all charges which

affect his integrity." That proclamation followed three pages of a decision which listed acts such as taking a report unfavorable to an alleged secret partner of the debtor and turning it over to the secret partner which resulted in it being found "dismembered with parts missing." Also the court declared that the trustee had appointed "a couple of young lawyers as his attorneys, who knew nothing about the affairs of the bankrupts, and who have accomplished nothing." Id. at 470. Surely after listing those actions the judge by using nonaccusatory language did not change the real standard of showing actual fraud or harm to the estate. But it did establish the general principle that without proving any actual wrongdoing a trustee may be removed under a standard so vague that it is virtually unassailable even by a trustee who is completely innocent.

Convenience and expeditiousness appear to be important factors in choosing the "best interest of the estate" standard. Faced with voluminous charges and countercharges the court in In re Savoia Macaroni Mfg. Co. 4 F.Supp. 626, 627 (E.D. New York 1933) held "while the court can determine and should promptly determine and ignore baseless charges, yet, when charges are made which have some substance in fact although the ultimate decision of same might prove groundless or grossly exaggerated the court should not delay the necessary administration of the estate in order to determine the ultimate truth of such charges." The court went on to say "without deciding the truth or falsity of the various charges made here, and solely in the interest of this harmony and the proper and efficient administration of this estate, this court has granted the motion to remove the present trustee."

The court in In re Quick, 43 F.Supp. 489, 490 (E.D.Ill.1942) chose to follow Bollman and removed the trustee "without reflection upon his honesty or integrity." The best interest of the estate standard appears again to have been chosen for convenience (859) and not a lack of grounds which were documented in that decision.

Similar to the previous cases which appear to list charges that would qualify under the more concrete standard of "actual fraud or harm" but yet rule in the "the best interest of the estate" is In re Greenwood Village, Inc., 2 BCD 1053 (N.D.Ohio 1976). Greenwood cited Savoia, Bollman and Quick to hold that without finding the trustee guilty of any personal dishonesty the court can remove the trustee to preserve harmony which is the "best interests of the estate." The "best interest" "no guilt" standard was used in In re Greenwood Village, Inc., 2 BCD 1053

(N.D.Ohio 1976) even though the court stated the trustee "pursued litigation contrary to the orders of the bankruptcy court" and he "rejected a settlement offer

creditors, even though his counsel advised him the case. . .could not be won." Furthermore he "advanced certain charges of misconduct by Bankruptcy Judge Harold F. White. . .said charges totally unsupported in fact." Id. at 1054. Finally the court stated the probable reason for the trustee's actions was that "his interest is adverse to that of the estate" Id. at 1057 yet the court was reluctant to rule on the truth of the matters asserted. Peoples Bank also refers the court to Gross v. Russo (In re Russo), 18 B.R. 257 Bankr.N.D.N.Y. (1982) which is another case removing the trustee in the "best interests of the estate" after listing what appears to be a conflict of interest but which

refuses to find actual misconduct.

Perhaps if the problem is viewed as keeping the estate administration moving at any cost then the "best interest" standard is adequate. However the court is afraid that without addressing the truth of the allegations an honest trustee can be removed by plaintiffs who bombard the court with numerous charges that threaten to delay the administration of the estate. This Court is unwilling to allow blackmail to occur in order to make its job easier or hasten the administration of the estate. Peoples Bank, sticking to cases which do not require a finding of actual fraud or harm, has asked the court to follow In re Combined Metals Reduction Company, 557 F.2d 1797, 197 (9th Cir. 1977) which held that "A trustee should not only avoid impropriety but also the appearance of impropriety." The court in Combined Metals was not ruling on removal of the trustee

but was instead remanding to the district court the issue of whether the trustee had breached his fiduciary duty by granting a compromise to his brother who was a creditor of the estate. The court ordered the district court to determine if there was any loss to the estate and if the trustee should be held personally liable. Therefore the Court finds that Combined Metals does not provide a standard for removal in the case sub judice.

[1] This Court believes the better standard and the one most frequently used in recent bankruptcy cases to be the one espoused in In re Freeport Italian Bakers, Inc. 340 F.2d 50, 54 (2nd Cir.1965) which states "grounds for disapproval or removal of a trustee in bankruptcy are not to be found in his formal relationships. We have traditionally stressed the elements of fraud and actual injury to the debtors' interests." That standard has been

followed in Baker V. Seeber (In re Baker), 38 B.R. 705 (D.Md.1983); In re Microdisk, Inc., 33 B.R. 817 (D.Nev.1983); In re Rea Holding Corporation, 2 B.R. 733 S.D.N.T. 1980); In re O.P.M. Leasing Services, Inc., 16 B.R. 932, 8 BCD 841 (Bankr.S.D.N.Y. 1982) and In re Concept Packaging Corp., 7 B.R. 607 (Bankr.S.D.N.Y.1980). Forcing the accusers to quickly come forward and show actual harm or fraud protects not only innocent trustees but also the orderly administration of estates which should not be disrupted because creditors are unhappy when trustees institute actions against them pursuant to their statutory duties to recover preferences or fraudulent transfers.

THE LITIGATION FUND

The first allegation to be discussed is whether the Trustee allowed $13,880 col- (860) lected by creditors for a litigation fund to fall into the hands of

Merle C. Weber and then if he further refused to take possession of those funds which in Peoples Bank's opinion was ordered by this Court on June 4, 1982. This allegation contains two contentions which must be examined separately.

[2] First the court must consider the suggestion that the Trustee allowed the funds to "fall into" the hands of Mr. Weber. The uncontroverted testimony at trial was that the creditors gave the money to Mr. Weber. One of these contributors was Peoples Bank which gave $3,500 to Mr. Weber (the $3,500 was not part of the $26,000 Peoples had advanced to Mr. Weber to collect Rentar's debt.) Further evidence that the funds were put in Mr. Weber's control by the creditors is found in the Trustee's Application for Instructions and Advice filed April 30, 1982. That document which sought advice from the court on the propriety of

accepting $13,880 from the creditors stated that the money was deposited with Mr. Weber. There being no evidence that the money was ever presented to the Trustee the court must find that the allegation that he allowed it to fall into the hands of Mr. Weber is completely without merit.

[3] The second part of this particular cause for removal concerns Peoples Bank's interpretation of this Court's Order of June 4, 1982 which was issued in response to the Trustee's application for Instructions and Advice. Peoples Bank argues that because the Trustee did not obtain the funds from Mr. Weber he was in contempt of court and furthermore, Peoples Bank suggested that the Trustee's actions were influenced by his having received a personal loan from Mr. Weber. The Trustee argues the Order merely authorized him to accept the $13,880 subject to certain conditions. Therefore, according to the

Trustee the funds could not become assets of the estate until they were received by the Trustee which was an event that never occurred.

One of the questions asked by the Trustee in his Application for Instructions and Advice was "may he be permitted to receive and use such funds for the purposes specified?" This court's June 4, 1982 Order stated that the Trustee was "authorized to accept" the funds. The court's interpretation of that language is guided by the Sixth Circuit Court of appeals decision in U.S. v. Zipkin, 729 F.2d 384 (1984).

In Zipkin the court was asked to rule on the admissibility of Bankruptcy Judge John F. Ray Jr.'s testimony interpreting his Order concerning the payment of fees to the receiver of a bankruptcy estate. In reversing the District Court, which had allowed the testimony, the Court of Appeals

stated, "An order entered by a judge should speak for itself and not be varied by parol testimony as to what was meant by its provisions" Id. at 389.

The Order in question which was in response to a request for permission to receive funds reads "the Trustee be, and hereby is, authorized to accept the sums." On its face the Order does not contain language which directs the Trustee to collect the funds from Mr. Weber or the creditors. In fact until someone delivered the funds to the Trustee the creditors had control over their money and could have rescinded their offer to create a litigation fund. Due to the nature of the Trustee's question and the decision in Zipkin, which declares the court Order must speak for itself, the court finds that the Trustee was merely authorized to receive the creditors' funds and that, contrary to Peoples Bank's interpretation, the funds

were not property of the estate which he had a duty to collect.

[4] Peoples Bank further contends that the Trustee's failure to take possession of the creditors' litigation fund was due to the fact that he was the recipient of a personal loan in the amount of $22,000 (the trustee admits to having received $27,500) from Mr. Weber. Although in a supplemental memorandum Peoples Bank states that the Trustee "sold his soul and his office" for the loan the only actual harm alleged was that the loan prevented him from collecting the $13,880 from Mr. Weber. The court (861) has already determined the Trustee did not have a duty to seize the funds from the creditors or Mr. Weber and therefore the loan cannot be found to have influenced the Trustee in that regard. However the existence of the loan is certainly the basis of Peoples Bank's insistence on this Court's adoption of the "appearance of

impropriety" standard and it is a perfect example of why the court has disdain for it.

Peoples Bank, in stridently righteous language, has claimed that the fact that the Trustee dealt with Mr. Weber who has been convicted of making false statements to a grand jury, and more recently of offering gratuities to a United States Attorney, totally corrupted the Trustee and undermined the creditors' confidence in him. Such an accusation seems ludicrous in light of the evidence adduced at trial which indicated no one enjoyed a closer relationship with Mr. Weber than Peoples Bank and its President, Mr. Huffman. It was Peoples who began its relationship with Mr. Weber two months before the Hartleys' filed for bankruptcy. It was Peoples who paid Mr. Weber $26,000 and authorized him to act as its agent. It was Peoples and Mr. Huffman who loaned money to Mr. Weber.

And it was Peoples who had knowledge of and gave its approval to the Trustee's relationship with Mr. Weber until the Trustee sued the bank. To allow the Trustee to be removed on nothing more substantial than the "appearance of impropriety" would be to lend this Court's power to those who would seek to coerce trustee's into not performing their duties.

Apparently Peoples Bank has harbored that notion since January 13, 1982 when it sent a letter to the Trustee saying that the funds it advanced as part of the creditors' fund must be refunded if the Trustee instituted a lawsuit against it to recover monies paid to the bank by or on behalf of Hartley. The court disapproved of any such conditions by providing in its June 4, 1982 Order that when the Trustee accepted the creditors' fund it was with no strings attached. The court has no intention of permitting Peoples to achieve

the same goal indirectly by using the "appearance of impropriety" standard.

TRUSTEE'S CONFLICT OF INTEREST

[5] The second cause for removal asserted by Peoples claims that a conflict of interest arose as a result of the Trustee's ownership of stock in Peoples Bank as the trustee in the Larry Miller case. As the trustee for Miller, Mr. Derryberry became the owner of 21 shares of Peoples Bank stock pursuant to 11 U.S.C. Section 541. Peoples Bank argues the conflict of interest began when, as the trustee for Hartley, Mr. Derryberry sued Peoples. The Trustee contends that since Peoples Bank knew of the stock ownership and at least tacitly lent their approval to the situation, it is estopped from arguing conflict of interest two years later. The Trustee further contends that mere allegations of potential conflict are not sufficient to remove the trustee.

The court agrees with the Trustee who relies on In re National Public Service Corporation, 68 F.2d 859 (2d Cir.1934) which held after a certain creditor had worked hand in hand with the trustee for eight months without opposition that creditor was estopped from raising the issue of the conflict of interest. The court states "Other creditors may be entitled to ask us to do this but we are not disposed to hear that complaint in the mouths of these appellants." Id. at 863. It is appropriate to hold Peoples Bank is estopped from arguing conflict of interest in this case because Peoples Bank was aware of the stock ownership question for approximately two years and it failed to raise an objection until the commencement of an action against Peoples Bank.

[6] The court notes that the Trustee became the owner of the stock by operation of law. This is not the usual conflict of

interest case where self dealing is involved. There has been no evidence presented that the trustee was personally enriched nor that the estate was harmed. There was some testimony that Peoples Bank stock was sold for $50 a share and was repur- (862) chased at $50 per share which indicates the value of the stock has not sufiered. Although the time of those transactions is not certain there certainly was no testimony that indicated Peoples Bank stock declined as the result of the lawsuit. Of course as previously stated actual fraud or harm must be shown to establish cause for removal. Accordingly, not only is Peoples estopped from alleging conflict of interest they also failed to meet this Court's standard for removal.

THE INSURANCE CHECKS

[7] The third cause for removal centers around the Trustee's receipt of ten checks from the Midwest Insurance Company.

Two of the checks were made payable solely to Mr. Hartley so the Trustee was able to cash and deposit them. However the other eight checks from Midwest listed Hartley and an additional payee. Peoples Bank claims the Trustee should be removed because he did not cause the third parties to endorse the checks and that those checks are now worthless since Midwest Insurance has collapsed.

Peoples Bank is laboring under the misconception that any proceeds due the estate have been lost as a result of Midwest's collapse. That assumption is erroneous because the insurer is Lloyds of London and it is they, not Midwest Insurance who must pay on the policies. The co-payees brought suit against Lloyds for sums far in excess of the amount of the checks offered by Midwest and the case is now in the District Court for the Northern District of Ohio. The Trustee is a party

defendant in this proceeding, wherein the rights of all parties, including the trustee's will be determined. Thus, there has been no loss to the estate of any interest it may have under the terms of the insurance policy.

The suggestion that the Trustee should have secured endorsements immediately on the checks so they could have been cashed before Midwest collapsed would have been harmful to the estate if it could have been done at all. First, it is unlikely the additional payees would have endorsed the checks because they were payable in amounts far less than the actual claims and to endorse the checks according to language on the back of the check was to relinquish all further claims. Secondly, if the checks were endorsed and the estate settled for a fraction of what it was entitled to it is clear the Trustee would have been attacked on those grounds. Under the circumstances

it appears the Trustee properly carried out his duties in this matter and as such these actions cannot serve as cause for removal or the awarding of damages.

THE ADMINISTRATIVE CLAIM FOR STORAGE COSTS

[8] The fourth cause for removal concerns an administrative claim filed by the Freuhauf Trailer Corporation. The Trustee attempted to sell four trailers which Freuhauf held liens on from Freuhauf's lot. Freuhauf filed an administrative claim under Section 503(b) for $3,500 for storing the trailers on its lot. Peoples Bank contends the Trustee should have taken possession of the trailers and avcided any expense to the estate. The Trustee's position at trial was that the issue is prematurely raised since the trailers have not all been sold nor the claim allowed.

The Trustee's argument is well taken.

If any money becomes available to pay Section 503(b) claims, the Trustee may object to this claim. It may be disallowed. On the other hand the trailers may sell for more than the amount of the lien and Freuhauf may seek storage costs under Section 506(b). There are other possibilities but this Court in a removal case focuses only on actual fraud or harm which has not been demonstrated in this allegation. The mere act of filing an administrative claim does not constitute grounds for removal as alleged by Peoples Bank.

TRUSTEE'S FAILURE TO PURSUE A PREFERENCE CLAIM

The fifth allegation of Peoples Bank is that the Trustee should be removed for failure to pursue a preference claim (863) against Richard C. Gottfried. The Trustee's response is that based on 15 years experience as a trustee and the

advice of legal counsel a preference could not be proved and if it could the cost in time and expense would far outweight any judgment granted.

The alleged preference involves two checks post dated July 8, 1981 and July 15, 1981 in the amount of $25,000 each. Both checks were payable to James Hartley from Safeway Truck Lines. The checks were endorsed by Mr. Hartley and sold to Mr. Gottfried in return for $45,000 on June 1, 1981. When Mr. Gottfried presented the checks for payment the bank refused to honor them.

On July 16, 1981 Mr. Gottfried received a letter from Rentar Industries (a parent company of Safeway Truck Lines) along with a $5,000 check representing an agreement that had been reached to provide for payment of the returned checks in ten installments. Mr. Gottfried received another check for $5,000 on July 29, 1981.

The remaining eight installments were not made.

At trial the Trustee testified that he considered the possibility of filing a preference action against Mr. Gottfried but after weighing several factors he decided against it. One of the factors considered by the Trustee was that the checks were drawn on Safeway Truck Lines and not the debtor and if Safeway was liable enormous expense would be incurred investigating a claim against them. Coinciding with the fear of high investigative and legal costs is the fact the amount of the alleged preference is only $10,000. Another factor listed by the Trustee was the possibility that Section 547(c) exception might apply. Finally the Trustee testified he used his 15 years experience as a trustee and the advice of counsel to reach the decision not to file a preference action against Mr. Gottfried.

[9] It has not been alleged the Trustee was ignorant of the possibility of a preference action. Nor that he negligently missed a filing date. What Peoples Bank has really alleged is that because the Trustee knew of Mr. Weber's fee contract with Mr. Gottfried, he was afraid to sue and jeopardize Mr. Weber's fee. That argument doesn't hold water in light of the fact that Peoples Bank had a similar arrangement with Mr. Weber and that did not prevent the Trustee from suing Peoples Bank to recover preferential payments. Furthermore a suit by the Trustee against Mr. Gottfried would not affect Mr. Weber's interests. The standards for determining whether a trustee is liable in his official capacity or personally and the business judgment rule provide guidelines by which the Trustee's decision not to pursue a preference action against Mr. Gottfried can be evaluated. The Sixth Circuit Court of

Appeals in Ford Motor Credit Company v. Weaver, 680 F.2d 451, 461 (1982) held:

A bankruptcy trustee is liable in his official capacity for acts of negligence. (citations omitted) The applicable standard is the exercise of due care, diligence and skill both as to affirmative and negative duties. (citation omitted) The measure of care, diligence and skill required of a trustee is that of 'an ordinarily prudent man in the conduct of his private affairs under similar circumstances and with a similar object in view.' (citation omitted) Mistakes in judgment cannot be the basis of a trustee's liability in his official capacity. (citation omitted) The failure to meet the standard of care, however, subjects the trustee to liability in his official capacity. (citation omitted) A bankruptcy

trustee is liable personally only for acts willfully and deliberately in violation of his fiduciary duties. (citation omitted) The court believes the Trustee did not willfully and deliberately breach his fiduciary duty but instead exercised his discretion and made a judgment based on his experience, advice of counsel, and the other factors he stated affected his decision.

[10] The Court finds that the Trustee's action is analogous to a business judgment. The role of the court in applying hindsight to a business judgment was explained in In re Curlew Valley Associates, 14 B.R. 506, 513 (Bankr.D.Utah 1981) which stated "In (864) short, the court will not entertain objections to a trustee's conduct of the estate where that conduct involves a business judgment made in good faith, upon a reasonable basis, and within the scope of his authority under the

Code." The court finds that the Trustee's decision not to pursue a preference action against Mr. Gottfried was not negligent or fraudulent but was based on his sound judgment after weighing all relevant factors and as such cannot be grounds for removal.

TRUSTEE'S FAILURE TO RENT OR SELL DEBTOR'S RESIDENCE

The sixth and final allegation by Peoples Bank is that the Trustee should be removed because he failed to rent the personal residence of the debtor. Peoples also contends that the Trustee not only failed to rent but compounded his transgression by not selling the house, and his opposition to an abandonment proceeding. Peoples Bank is seeking the fair rental value of $450 a month in damages. The Trustee had repeatedly conveyed the message that the debtor has no equity in the home and that while he

opposed the abandonment, he would have agreed to a modified relief from stay.

The only reason the court can assume for such a misguided cause for removal is the plaintiff's lack of understanding of the bankruptcy process. The first mortgage holder, Diamond Savings who had the first and best lien on the property, and Peoples Bank which held the second mortgage should not look to the Trustee to manage or liquidate burdensome property of no benefit to the estate. However, the Trustee explained to the first mortgage holder that his purpose in objecting to abandonment was that if by some remote possibility the residence were to sell for more than the first and second mortgages, the estate would not be entitled to the proceeds, whereas with a relief from stay it would.

[11] Attempting to demonstrate a duty to rent Peoples Bank cites 11 U.S.C. Section 541(a)(6) which in pertinent part

states:

(a) The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located:

(6) Proceeds, product, offspring, rents, and profits of or from property of the estate, except such as are earnings from services performed by an individual debtor after the commencement of the case.

Section 541 describes what is property of the estate. If a rental property was owned by the debtor then the trustee has a right to collect the rents.

Section 541 does not create an affirmative duty to force the debtors to pay rent or evict them to find someone who can. Needless to say Peoples Bank has not provided any legal authority for the Trustee's duty to rent or sell the debtors'

residence, where the estate has no equity, which would inure solely to the benefit of the secured creditors.

[12] The Trustee in his pretrial brief listed all of the problems that would be incurred in evicting the debtors and renting the residence. The court does not need to dwell on those details because it is sufficient to state the Trustee did not have a duty to rent or sell the debtor's residence where there was no equity for the estate. Accordingly the court finds Peoples Bank has not shown cause for removal or the awarding of damages on this ground.

CONCLUSION

The court finds that on all six grounds Peoples Bank has failed to show actual fraud or harm to the estate. Instead Peoples exhibited a tactical maneuver which initially was designed to pressure the Trustee not to sue to recover preferential

payments, but once that strategy was foreclosed the primary goal appeared to be revenge. It is not surprising that great animosity was generated between parties who had worked together only to find themselves adversaries in court. The court understands that Peoples Bank resented being sued after they offered to contribute to a litigation fund. But whatever the reasons for hard feelings in this case the court (865) is cognizant that it is setting a standard to be applied to trustees in the future and it believes that they should not be subject to the threat of tenuous and specious claims for removal. By adhering to the actual fraud or harm standard creditors are not left with an insurmountable task in trying to remove a trustee. They are merely required to rise above groundless accusations and prove that the trustee has actually engaged in wrongdoing or harm to the estate. Failure

to use that test leaves innocent trustees open to the threats of unscrupulous parties and jeopardizes the orderly administration of the estate by the disruptive process of removing and appointing trustees.

In light of the foregoing, it is hereby,

ORDERED that the plaintiff's complaint seeking damages be, and it hereby is dismissed with prejudice. It is further,

ORDERED that the motion of The Peoples Banking Company seeking removal of the trustee be, and it hereby is, denied with prejudice.

(3)

No. 88-1034

Supreme Court, U.S.
FILED
FEB 18 1989
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1988

QUENTIN M. DERRYBERRY, II, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WILLIAM C. BRYSON
Acting Solicitor General
EDWARD S.G. DENNIS, JR.
Assistant Attorney General
SARA CRISCITELLI
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

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QUESTIONS PRESENTED

1. Whether a question asked of petitioner under oath was "fundamentally ambiguous" as a matter of law and thus could not be used as a basis for petitioner's perjury conviction.

2. Whether a bankruptcy judge's factual finding, which was based in part on petitioner's false testimony and which was made in a civil proceeding in which the United States did not participate, collaterally estops the government from prosecuting petitioner for perjury.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A18) is unreported. An earlier opinion of the Bankruptcy Court for the Northern District of Ohio (Pet. App. C1-C51) is reported at 50 Bankr. 852.

JURISDICTION

The judgment of the court of appeals was entered on August 24, 1988. A petition for rehearing was denied on October 13, 1988. The petition for a writ of certiorari was filed on December 12, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Northern District of Ohio, petitioner was convicted of perjury, in violation of 18 U.S.C. 1623, and embezzlement from a bankruptcy estate, in violation of 18 U.S.C. 153. He was sentenced to three years' probation and was ordered to pay $8500 in restitution. The court of appeals affirmed petitioner's perjury conviction but vacated his conviction for embezzlement (Pet. App. A15-A17).[1]

1. The facts underlying petitioner's conviction are set out in the opinion of the court of appeals (Pet. App. A1-A9) and in the government's brief below (Gov't C.A. Br. 1-13). Briefly, they show that petitioner, an attorney who was appointed as a trustee in bankruptcy, committed perjury at a bankruptcy court hearing on a motion filed by a creditor to remove petitioner from his trusteeship position.

In September 1981 petitioner was appointed trustee in the voluntary bankruptcy of James Hartley. In his role as trustee, petitioner worked closely with Merle Weber, who represented some creditors of the bankrupt estate. Weber and petitioner determined that Hartley had other assets that he had not declared and that might be available for distribution to Hartley's creditors. Accordingly, in November 1981 petitioner and Weber met with an attorney, George Ferstle, to discuss forming a creditors' fund through contributions by Hartley's creditors, including the Mid-West Insurance Agency and the Peoples Banking Company of McComb. Petitioner proposed that

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[1] The jury acquitted petitioner of the charge of conspiracy to embezzle money from a bankruptcy estate and was unable to reach a verdict on a second perjury count. After the jury announced its inability to reach a verdict on the second perjury count, the district court entered a judgment of acquittal on that count.

the fund would pay for an attorney for the trustee and would defray the investigative costs incurred in uncovering the hidden assets.

On December 16, 1981, petitioner held a creditors meeting to discuss the establishment of the fund. Petitioner explained to the assembled creditors that the estate lacked liquid assets for the investigation and anticipated litigation, which petitioner speculated would cost approximately $75,000. Petitioner also proposed that Weber would serve as the investigator and would work with him and attorney Ferstle. Following the meeting, several creditors made out checks payable to petitioner. The owner of Mid-West gave Weber a check for $5000 payable to petitioner. The Mid-West check was deposited into petitioner's personal checking account, and petitioner spent the proceeds for his personal use. The chief executive of the Peoples Bank gave Weber a check for $3500 to give to petitioner. The check bore the notation "For PBC-Creditors' Group." Petitioner deposited that check as well into his personal account and spent the money for his own personal use.

Other creditors also gave checks to Weber for the fund. For example, one gave Weber a check for $2000, which was made payable to petitioner and which bore the notation "Expense fund—Hartley recovery." Weber deposited those checks into his personal checking account at the Peoples Bank, after endorsing petitioner's name on them. The bank's chief executive officer asked Weber about the endorsements; Weber stated that petitioner had agreed to the procedure, and petitioner repeatedly assured the bank officer that he had authorized Weber to sign his name. Pet. App. A3-A4.

In April 1982, Ferstle prepared an Application for Instructions and Advice that sought guidance from the bankruptcy court concerning the handling of the creditors' fund money. The bankruptcy court held a hearing on the

application the following month, which petitioner attended. At the hearing Ferstle told the bankruptcy judge that the organizers of the creditors' fund had already collected $12,000 to $13,000 from the creditors and that Weber was holding the funds in escrow and was awaiting instructions. The court approved the fund but made clear that Weber was not to participate in the fund in any way. On June 4, 1982, the court entered an order, attached to which was an exhibit setting forth the contributions made by various creditors, including Mid-West and the Peoples Bank. The total amount of the creditors' contributions reflected on the exhibit was $13,880. The two largest contributions were the $5000 from Mid-West and the $3500 from the Peoples Bank. In addition, there were 11 other contributions ranging in amount from $40 to $2000. Pet. App. C8.

2. In November 1983, the Bank moved to have petitioner removed as trustee of the Hartley estate. In April 1985 the bankruptcy court held a hearing on the Bank's motion. Petitioner testified at the hearing. During his testimony, he was shown a copy of the schedule of contributors and amounts contributed that had been attached as an exhibit to the June 1982 order. He testified about the schedule as follows (Gov't C.A. Br. 12, citing Tr. 645-646):

> Q. Does that order contain a list of creditors and amount of money beside their names as an exhibit?
> A. It does.
> Q. Does that amount of money total $13,880.00?
> A. It's not totalled.
> Q. Have you ever taken the time to total it?
> A. I'm familiar with the figure that is $13,880.00.
> Q. Have you ever had possession of any of that $13,880.00?
> A. No Sir.

Based in part on that testimony, in June 1985 the bankruptcy judge entered an order (Pet. App. C1-C51) in which he found that "[t]he $13,880 was never turned over to [petitioner] by Mr. Weber nor was any action taken by creditors demanding the return or delivery of their contributions" (*id.* at C8). The judge further found that "[t]he uncontroverted testimony at trial was that the creditors gave the money to Mr. Weber. * * * There being no evidence that the money was ever presented to the Trustee the court must find that the allegation that he allowed it to fall into the hands of Mr. Weber is completely without merit." *Id.* at C27-C28. For those reasons, among others, the bankruptcy court denied the bank's motion to remove petitioner as trustee. *Id.* at C51.

3. Petitioner was subsequently indicted on several charges relating to the handling of the money in the creditors' fund and petitioner's testimony before the bankruptcy judge on that subject. The perjury count on which petitioner was ultimately convicted was based on his testimony that he had never been in possession of any of the $13,880 in the creditors' fund. The court of appeals affirmed petitioner's conviction on that count, rejecting his argument that the question about his possession of the $13,880 was ambiguous and his argument that his testimony on that point was not material to the proceeding before the bankruptcy judge. Pet. App. A12-A15.

ARGUMENT

1. Petitioner challenges his perjury conviction on two grounds. First, he contends (Pet. 26-32) that the question whether he ever had possession of any of the $13,880 collected from the creditors was ambiguous as a matter of law. The issue whether the question was ambiguous is a fact-specific issue that was resolved against petitioner by

both courts below. Accordingly, further review of that question is not warranted. In any event, petitioner's suggestion of ambiguity is without substance.

As the court of appeals found, "[petitioner's] testimony here was literally false." Pet. App. A13. The question whether petitioner had "ever had possession of any of that $13,880" was clear on its face, and nothing about the context made it ambiguous. Consequently, petitioner's denial in response to that question was indisputably false.

Petitioner contends that the question was ambiguous because, when petitioner was asked at another point during the hearing whether he had received the Bank's $3500 contribution, petitioner admitted that he had. Thus, he urges, when he was asked about the $13,880 he must have understood the question to refer to those checks which were given to Weber and which Weber had deposited into his own account.

Petitioner is wrong in asserting that the question "Have you ever had possession of any of that $13,880?" was ambiguous. The question was perfectly clear, and petitioner's response was plainly false. Indeed, petitioner does not now deny that he had possession of some of the money that comprised the $13,880 listed in the exhibit attached to the June 1982 order; in fact, the evidence is clear that petitioner received and deposited into his own account the two largest contributions to the fund—the $5000 check from Mid-West and the $3500 check from the Peoples Bank. Those two checks alone made up more than half the $13,880 about which petitioner testified.

This Court's decision in *Bronston* v. *United States,* 409 U.S. 352 (1973), which involved an answer that was misleading but literally true, does not aid petitioner, since petitioner's answer was literally false. The issue in this case is therefore not the truth or falsity of petitioner's

testimony, but whether petitioner understood the question to refer to only a portion of the $13,880, as he claims. The issue of petitioner's understanding of the question, which goes to whether petitioner's false testimony was given knowingly, was a question for the jury. See *United States* v. *Anderson,* 798 F.2d 919, 930-931 (7th Cir. 1986); *United States* v. *Bell,* 623 F.2d 1132, 1136 (5th Cir. 1980); *United States* v. *Cuesta,* 597 F.2d 903, 920 (5th Cir.), cert. denied, 444 U.S. 964 (1979). The jury heard petitioner's explanation for testifying as he did about the $13,880, and it obviously did not credit that explanation, because by finding him guilty of perjury, the jury found that petitioner had knowingly testified falsely about the $13,880.

It is not surprising that the jury rejected petitioner's explanation for his false testimony. Contrary to his assertion, he did not "admit" receiving the $3500 Peoples Bank contribution to the creditors' fund. Rather, he "admitted" only that he had received a check from the bank. He denied that the check bore the notation "For PBC-Creditor's Group," although the evidence at trial showed that the explanation had been written on the check at the time petitioner received it. Gov't C.A. Br. 13 n.5, citing Tr. 520-532, 658. Thus, petitioner's "admission" with respect to the $3500 check does not indicate that his testimony about the creditors' fund was meant to apply only to the funds received by Weber. Moreover, petitioner did not admit at the hearing that he had also received the $5000 contribution from Mid-West. Petitioner's testimony at the bankruptcy hearing therefore does not support his contention that he necessarily misunderstood the question that was the subject of the perjury charge on which he was convicted.

2. Petitioner next contends (Pet. 32-33) that the bankruptcy judge's finding (Pet. App. C8) that "[t]he $13,880 was never turned over to the Trustee by Mr.

Weber" barred the perjury prosecution under principles of *res judicata* or collateral estoppel. Petitioner did not make this argument to the district court, nor did he argue it to the court of appeals until his petition for rehearing.[2] As a consequence, he has waived the claim. See *United States* v. *Lovasco,* 431 U.S. 783, 788-789 n.7 (1977); *Lawn* v. *United States,* 355 U.S. 339, 362-363 n.16 (1958).

Apart from the waiver, petitioner's argument is legally without support. Contrary to the conclusion of the court of appeals in connection with the embezzlement count (Pet. App. A16), the United States was not a party to the bankruptcy court proceeding. Neither the United States Attorney nor the Department of Justice joined in the Bank's motion to remove petitioner as trustee of the Hartley bankruptcy estate, and the United States did not participate in the hearing that led to the bankruptcy judge's finding on which petitioner relies.

As this Court has held, "the concept of collateral estoppel cannot apply when the party against whom the earlier decision is asserted did not have a 'full and fair opportunity' to litigate that issue in the earlier case." *Allen* v. *McCurry,* 449 U.S. 90, 95 (1980) (citation omitted)). Since the United States was not a party to the trustee removal proceeding, it had neither an opportunity to challenge the truthfulness of petitioner's testimony before the bankruptcy judge, nor an interest in doing so. Collateral estoppel is therefore inapplicable here.

In addition, the bankruptcy judge's finding, on which petitioner relies, was based at least in part on petitioner's testimony, which the jury in this case has found beyond a

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[2] In the court of appeals petitioner argued that the false statement was not material, challenging the sufficiency of the government's proof that the statement influenced the bankruptcy judge. The court of appeals rejected that claim. See Pet. App. A14-A15.

reasonable doubt to be false. Because the bankruptcy judge's finding was premised on false testimony, that finding is tainted by fraud and should not serve as the basis for preclusion of later proof of perjury in the bankruptcy proceeding. Cf. Restatement (Second) of Judgments §§ 28, 70 (1982) (relief from claim and issue preclusion where initial judgment was obtained by fraudulent means). If the rule were otherwise, a party could often avoid prosecution for perjury simply by lying in one proceeding, obtaining a favorable finding in that proceeding based on the perjured testimony, and then claiming that the government was estopped by that finding from proving that the testimony on which the first factfinder relied was false. To apply collateral estoppel in that context " 'would be to put a premium on perjury and to make immunity from punishment for perjury rest on success in commission of the crime.' " *United States* v. *Fayer,* 573 F.2d 741, 745 (2d Cir.) (citation omitted), cert. denied, 439 U.S. 831 (1978).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WILLIAM C. BRYSON
Acting Solicitor General

EDWARD S.G. DENNIS, JR.
Assistant Attorney General

SARA CRISCITELLI
Attorney

FEBRUARY 1989

U.S. GOVERNMENT PRINTING OFFICE: 1989—241-699/00110

Supreme Court, U.S.
FILED
MAR 10 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1034

IN THE SUPREME COURT OF THE UNITED STATES
Oct. Term, 1988

QUENTIN M. DERRYBERRY, PETITIONER

V.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE 6TH CIRCUIT

RESPONSE OF PETITIONER TO BRIEF IN OPPOSITION

Of Counsel:
Kenneth W. Sullivan
221 N. LaSalle Street
Suite 2100
Chicago, IL 60601
(312) 346-7600

George Pappas*
Walsh, Neville,
Pappas & Mahoney
221 N. LaSalle
Street
Suite 2100
Chicago, IL 60601
(312) 236-1900
*Counsel of Record

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In the Supreme Court of the United States
October Term, 1988

No. 88-1034

Quentin M. Derryberry II, Petitioner

v.

United States of America

On Petition For a Writ of Certiorari
To the United States Court of Appeals
For the 6th Circuit

Response of Petitioner To Brief In Opposition

ARGUMENT IN REPLY

I

Petitioner's Alleged Perjurious Response Was Given To A Question Susceptible To More Than One Interpretation.

The government's response brief is a disingenuous presentation of evidence that

was not accepted by either the jury or the trial court and of conclusions of fact and law unsupported by the record below and by case law. Appellant will briefly address certain of the mischaracterizations by the government of the evidence below and of appellant's arguments.

Appellant acknowledged in both the bankruptcy removal proceeding in 1985 and in the trial court below that he had received $8,500 in checks from Mr. Weber which the government alleged in the indictment had been embezzled by appellant from the Hartley bankruptcy estate. This $8,500, according to the government, was part of the $13,880 which appellant stated he did not have any part of. This dichotomy forms the essence of this Petition for Certiorari.

Realizing the weakness of its position on the issue presented, however, the government attempts to paint appellant in the worst light possible by focusing on the other money, apart from the $8,500, which

purportedly comprised the $13,880. At p. 3 of its Brief the government states that, with respect to the checks that comprised the balance of the $13,880, appellant repeatedly assured the McComb Bank president that he had authorized Mr. Weber to endorse his (petitioner's) name to those checks. Obviously, petitioner presented evidence to the contrary. More obviously, both the jury and the trial court believed petitioner since the jury acquitted him of all charges of conspiracy with Mr. Weber and the trial court entered a judgment of acquittal on the other perjury count which charged that petitioner perjured himself in the bankruptcy proceeding when he denied in that proceeding that he had any knowledge of Mr. Weber's forged endorsements prior to November of 1983.

Turning to the real issue before this Court, the government attempts to persuade this Court of its position by, among other things, mischaracterizing petitioner's

argument. The government states at pp. 6 and 7 of its Brief that "(t)he issue in this case is . . . not the truth or falsity of petitioner's testimony, but whether petitioner understood the question to refer to only a portion of the $13,880, as he claims". (emphasis added) Petitioner has nowhere made the argument that he understood the question asked by Mr. Clark in the bankruptcy proceeding to refer only to a portion of the $13,880. Rather, as indicated in the Petition For A Writ of Certiorari, at pp. 28 and 29, petitioner understood "the $13,880" to refer to the money purportedly held by Mr. Weber in a separate account at the time of the hearing on the Application for Instructions and Advice filed with the Bankruptcy Court by petitioner's counsel.

We cannot overstate the fact that, if you accept the government's interpretation of the question, it would be patently ridiculous for the petitioner to deny ever having had any of "the $13,880" in the very

same proceeding in which he had admitted having taken possession of the $3,500 McComb Bank check and used it for his own purposes. Obviously neither petitioner nor the Bankruptcy Court understood Mr. Clark's question in the context that the government has sought to place it.[1] The Bankruptcy Court, having heard petitioner testify to this receipt of the $3,500 McComb Bank check and other funds from Mr. Weber, part of which consisted of the $5,000 Midwest check, specifically found that "the $13,880 was never turned over the trustee by Mr. Weber . . . and that there was no evidence that the money was ever presented to the trustee." (Appendix, Exhibit C, pp. 8, 27 and 28).

With respect to petitioner's legal authority, the government argues that

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1. The government produced no evidence at trial that Mr. Clark, the questioner, understood or intended the question in accordance with the government's interpretation.

Bronston v. United States, 409 U.S. 352 (1973) is inapplicable to the case at bar because in that case the answer given was misleading but literally true, whereas in the case at the bar, the government contends, the answer was literally false. Obviously if the interpretation placed on the question by the petitioner and the Bankruptcy Court is accepted, then petitioner's answer is literally true. But the government argues that a defendant's understanding of the question is an issue for the jury to decide, citing United States v. Bell, 623 F.2d 1132, 1136 (5th Cir. 1980) and other cases. As in the case of United States v. Reveron Martinez, 836 F.2d 684 (1st Cir. 1988), however, the government "mishears for whom the Bell tolls" Id. at 691 fn. 10.

Petitioner recognizes that Bell distinguishes Bronston.

> In Bronston, the answer was a full explanatory sentence, the truthfulness of which could be determined without reference to the question. Here, the answer simply was "no"; the truthful-

> ness of that answer can be determined only by first looking to the question. Bronston simply did not deal with a yes or no answer given to a question susceptible to more than one interpretation.

Bell, Id. at 1136. Bell further observed that in the situation where the defendant's answer could be true under one interpretation of an arguably ambiguous question the "prevailing view" is that in such instances it is for the jury to decide the defendant's understanding of the question. Bell notes, however, that there is contrary authority, including Sixth Circuit authority, see United States v. Tonelli, 577 F.2d 200 (3rd Cir. 1978) and United States v. Wall, 371 F.2d 398, 399-400 (6th Cir. 1967), (which was cited with approval in Bronston, Id. at 600) to the effect that a defendant may never be convicted of perjury where the question could have been interpreted more than one way. See also, United States v. Eddy, 737 F.2d 564 (6th Cir. 1984) ("Vague and ambiguous questions are not acceptable").

Bell further notes that even in the situation where a question is subject to different interpretations, the jury's resolution of the issue is not immune from appellate review. If after reviewing the evidence in the light most favorable to the government, the appellate court finds that a reasonably minded jury must have a reasonable doubt as to the essential elements of the perjury charge, then defendant's conviction cannot stand. supra at 1136.

In the case at bar the Sixth Circuit did not undertake this exercise. Ignoring its own precedents and petitioner's arguments, the Sixth Circuit found simply that petitioner's testimony was literally false because petitioner had testified that he was "familiar with the figure that is $13,880". The Sixth Circuit did not, however, further examine the context which bred petitioner's familiarity. The fact is that when being asked about "the $13,880", petitioner was reviewing the Bankruptcy

Court's Order of June 4, 1982, which was entered in response to and made reference to the Trustee's Application For Instructions and Advice which had come on for hearing before the Bankruptcy Court on May 27, 1982. That document specifically references the fact that the approximately $13,000 contributed by the creditors, later listed on the Court's June 4 Order, was then in escrow with Mr. Weber. That document was drafted by petitioner's counsel based on information he received from Mr. Weber approximately three to four months after petitioner had received the monies from Mr. Weber which the government contends were part of "the $13,880".

A fair reading of the transcript of petitioner's testimony demonstrates that, as in Bell, after placing his answer in the context in which it was given, a jury could not find him guilty beyond a reasonable doubt. As Bell observes, "if after conviction the defendant offers a contrived

hypertechnical or lame interpretation of his answer . . . the jury's decision must be left undisturbed." Bell, supra at 1136. Here, as referenced in Bell, the petitioner has not created a lame interpretation of his testimony post conviction. The petitioner has consistently set forth his interpretation of the question posed, and that interpretation happens to coincide with the interpretation obviously placed on the question by the Bankruptcy Court who heard petitioner's allegedly perjurious testimony.

The evidence below certainly does not establish that petitioner understood the question posed by counsel for McComb Bank in the same manner that the government has sought to interpret that question. As stated in Bell, supra at 1137, echoing United States v. Tonelli, 577 F.2d 194, 200 (3rd Cir. 1978), "Defendants may not be assumed into the penitentiary." To allow defendant's conviction for perjury to stand in this case, this Court must assume the

government's interpretation of Mr. Clark's question is what petitioner understood. Such an assumption is unwarranted. To adopt the government's rationale this Court must ignore the context of the question, petitioner's avowed contrary understanding of the question and the Bankruptcy Court's obvious understanding of the question. This Court must conclude that a reasonable-minded jury must have a reasonable doubt in this case as to the existence of the elements of perjury.

II

The Bankruptcy Court's Judgment Is Res Judicata And Collateral Estoppel Of The Petitioner's Perjury Conviction.

The government contends that petitioner waived the argument that his conviction on Count 3 is barred under principles of res judicata and collateral estoppel because petitioner did not raise the argument in the trial court or in the Court of Appeals until petitioner filed his

petition for rehearing, citing United States v. Lovasco, 431 U.S. 783 (1977) and Lawn v. United States, 355 U.S. 339 (1958). In Lovasco, the petitioner did not raise the question sought to be reviewed even in a petition for rehearing and in Lawn, the petitioner did not raise the question sought to be reviewed even in his petition for writ of certiorari. Both cases, however, recognize that in exceptional circumstances, this Court will review questions not directly raised below.

In the case at bar, petitioner did not squarely raise the res judicata and collateral estoppel effect of the Bankruptcy Court judgment in the trial court as to this count. That was largely because petitioner has been overly consumed with the argument concerning the ambiguity of the question which is the subject of Count III. In deed, petitioner stands today convicted of perjury for a response he made to a question which to date he cannot comprehend as being perjurious. He

has spent three frustrating years asking courts to view the context in which the question was asked and the answer was given. Throughout that same time he contended that the Bankruptcy Court's Order was res judicata and collateral estoppel of the embezzlement charges brought against him. The res judicata and collateral estoppel effects of the Bankruptcy Court judgment were considered by both the trial court and the Court of Appeals. The Court of Appeals found that the principles of res judicata and collateral estoppel did bar the government's charges of embezzlement. Petitioner ultimately argued to the Court of Appeals, admittedly on petition for rehearing, that the same Bankruptcy Court's Order had the same collateral estoppel and res judicata effects on the perjury charge in Count III. The Court of Appeals denied petitioner's petition for rehearing in a one line Order.

Under these circumstances, it ill

becomes the government to contend that petitioner has waived this argument. The government has had every opportunity to argue the application of the collateral estoppel and res judicata effects of the Bankruptcy Court's judgment. The trial court found in favor of the government, denying petitioner's motion to dismiss the indictment. The Sixth Circuit, however, found that that judgment did have res judicata and collateral estoppel effects with respect to the government because the government was the largest creditor of the Hartley bankruptcy estate, was given notice of the proceedings, and was given the opportunity to participate. Clearly the application of res judicata and collateral estoppel principles have not been waived.

The only remaining question is whether the Bankruptcy Court made a specific finding that precludes the perjury charge against petitioner. The Bankruptcy Court's findings that the $13,880 was never turned over to the Trustee by Mr. Weber and that

there was no evidence that the money was ever presented to Mr. Derryberry preclude the perjury conviction because they constitute a finding that Mr. Derryberry's answer was literally true.

Consequently the only question the government could have posed with respect to the res judicata and collateral estoppel effects of the Bankruptcy Court's judgment on Count III was determined in favor of petitioner on Count II. The government makes it's waiver argument on Count III because it cannot argue substitively against the res judicata and collateral estoppel effects of the Bankruptcy Court's judgment on petitioner's conviction for perjury.(2)

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(2) The government makes a feeble attempt to undo the Sixth Circuit's finding with respect to Count II by stating in conclusory fashion, without any record authority, that the government was not a party to the bankruptcy proceeding and did not have a full and fair opportunity to be heard. The argument is flatly contradicted by the record. The government was the largest creditor of the Hartley bankruptcy estate; it filed an appearance in that

The fact of the Bankruptcy Court's findings and in the face of the Sixth Circuit's determination of the res judicata and collateral estoppel effects of the Bankruptcy Court judgment, it would be wholly incongruous and unjust for this Court to let stand petitioner's conviction for perjury.

The government also argues that a judgment based on perjured testimony should not be given res judicata or collateral estoppel effects, citing United States v. Fayer, 573 F.2d 741, cert. denied 439 U.S. 831 (1978). The government should read the cases it cites rather than just merely skimming the head notes. Fayer, in fact, stands for the proposition that a specific finding made in a prior proceeding even if

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cont.
estate; was given notice of the proceeding; and, as the largest creditor, undoubtedly had more interest than anyone in the outcome. Certainly the government was given the opportunity to participate. It chose not to.

purportedly the product of perjured testimony, would have res judicata effects on a specific prosecution for perjury. Clearly Fed. R. Civ. P. 60 with respect to the finality of judgment, even those procured by fraud, also serves to defeat the government's argument.

CONCLUSION

For the reasons hereinbefore set forth, petitioner prays that this Honorable Court grants the Petition for Writ of Certiorari and reverses petitioner's conviction for perjury under Count II of the government's indictment.

Respectfully submitted,

George Pappas

Walsh, Neville, Pappas & Mahoney

Attorney for Petitioner
Quentin M. Derryberry II

Of Counsel:

Kenneth W. Sullivan